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In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, APPELLANT

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.

COMMONWEALTH OF MASSACHUSETTS, ET AL., APPELLANTS

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, ET AL.

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., APPELLANTS

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a state statute that prohibits the transmission or sale of hydroelectric power generated in that state to other states without the authorization of the State Public Utility Commission is preempted by the Federal Power Act and therefore violates the Supremacy Clause of the Constitution.

TABLE OF CONTENTS

	Page
Interest of the United States and the Federal Energy Regulatory Commission	2
Opinions below	3
Jurisdiction	3
Constitutional and statutory provisions involved	3
Statement	4
Summary of argument	7
Argument:	
The New Hampshire statute prohibiting the transmission or sale of hydroelectric power generated in that state to other states is preempted by the Federal Power Act and therefore violates the Supremacy Clause of the Constitution	10
A. The states have no authority to regulate the interstate transmission and wholesaling of hydroelectric energy	10
B. The language and legislative history of Part II of the Federal Power Act confirm that Section 201(b) does not authorize the states to regulate the interstate transmission and sale for resale of electric power	13
C. The order of the New Hampshire Public Utilities Commission is contrary to Part I of the Federal Power Act	24
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380	26
Connecticut Light & Power Co. v. *FPC*, 324 U.S. 515	15

Cases—Continued: Page

First Iowa Hydro-Electric Coop. v. *FPC*, 328 U.S. 152 ..... 10, 11, 19, 25
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 18
FPC v. *Southern California Edison Co.*, 376 U.S. 205 ..... 7, 11
FPC v. *Union Electric Co.*, 381 U.S. 90 ..... 10, 11
Hines v. *Davidowitz*, 312 U.S. 52 ..... 8, 22, 24
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 .. 18
Hughes v. *Oklahoma*, 441 U.S. 322 18
Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27 ..... 18, 20
Maryland v. *Louisiana*, No. 83 Orig. (May 26, 1981) 22
Missouri v. *Kansas Gas Co.*, 265 U.S. 298 16
Northern Natural Gas Co. v. *Kansas Commission*, 372 U.S. 84 26
Oklahoma v. *Kansas Natural Gas Co.*, 221 U.S. 229 ..... 9, 16, 17, 20
Pennsylvania v. *West Virginia*, 262 U.S. 553 ..... 9, 16, 19
Pennsylvania Gas Co. v. *Public Service Commission*, 252 U.S. 23 16
Philadelphia v. *New Jersey*, 437 U.S. 617 18
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 .... 6, 7, 8, 9, 11, 12, 14, 16, 21, 22
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 ..... 8, 22
Reeves, Inc. v. *Stake*, 447 U.S. 429 18
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 ..... 8, 22
Safe Harbor Water Power Corp., 5 F.P.C. 221 20
United States v. *Public Utilities Commission of California*, 345 U.S. 295 ..... 7, 12, 20

Constitution and statutes:

United States Constitution:
Article I, Section 8, Clause 3 (Commerce Clause) 3, 12, 14, 18
Article VI, Clause 2 (Supremacy Clause) 3, 8, 12, 22, 24

Constitution and statutes—Continued: Page

Federal Power Act, 16 U.S.C. (& Supp. III) 791a *et seq.* 2
Part I, 16 U.S.C. 792-823 ..... 4, 6, 9, 10, 12, 24, 25, 26
Section 4(e), 16 U.S.C. 797(e) 3-4
Section 10(a), 16 U.S.C. 803(a) 3-4, 10, 11, 25
Section 23(b), 16 U.S.C. 817(b) 3-4, 10
Section 27, 16 U.S.C. 821 19
Part II, 16 U.S.C. (& Supp. III) 824-824k ..... *passim*
Section 201(a), 16 U.S.C. 824(a) 3-4, 13, 20
Section 201(b), 16 U.S.C. (& Supp. III) 824(b) ..... *passim*
Section 201(b)(1), 16 U.S.C. (& Supp. III) 824(b)(1) 14, 21
Section 202, 16 U.S.C. 824a 21, 23
Section 202(a), 16 U.S.C. 824a(a) 23
Section 205(b), 16 U.S.C. 824d(b) 22
Section 210, 16 U.S.C. (Supp. III) 824i 24
Section 211, 16 U.S.C. (Supp. III) 824j 24
Section 212, 16 U.S.C. (Supp. III) 824k 24
Part III, Section 302, 16 U.S.C. 825a 20
Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 24
N.H. Rev. Stat. Ann. § 374:35 (1966 repl.) 3, 4, 25

Miscellaneous:

79 Cong. Rec. (1935):
p. 8775 15
p. 10527 19
H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 12, 15, 20
Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935) 15, 16, 23
Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce, 74th Cong., 1st Sess. (1935) 15, 16
S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 12, 15, 16, 23

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INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

This case presents an important question concerning the scope of permissible state authority within the federal regulatory scheme established by the Federal Power Act. Part I of the Federal Power Act (16 U.S.C. (& Supp. III) 791a *et seq.*) accords the Federal Energy Regulatory Commission comprehensive licensing authority over the nation's water power resources in order to benefit interstate commerce. Part II of the Act gives the Commission regulatory ratemaking authority over various aspects of the transmission and sale of electric energy in interstate commerce, including transmission and sales from hydroelectric projects licensed under Part I.

Here, the New Hampshire Supreme Court held that a New Hampshire statute which prohibits the export of hydroelectric energy generated in that state, without the permission of the state public utility commission, was authorized by Section 201(b) of the Federal Power Act (16 U.S.C. (& Supp. III) 824(b)). The United States and the Federal Energy Regulatory Commission believe that Congress did not intend the Commission's administration of the Federal Power Act to be subordinated or subjected to such state administrative orders. Under the decision below, the Commission would be required to administer the Federal Power Act in accordance with the terms and conditions placed by each state upon the transmission and sale in interstate commerce of electricity generated from the resources within that state. Moreover, the New Hampshire court's decision sharply departs from the congressional policy to promote the regional pooling of energy producing resources, which the Commission has consistently encouraged with its efforts to provide nationwide coordination in the use of scarce energy resources.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (J.S. App. 1a-14a)[1] is not yet reported. The New Hampshire Public Utilities Commission's Report and Order dated August 27, 1980 (J.S. App. 15a-24a) and its Report and Order dated September 19, 1980 (J.S. App. 25a-40a) are also unreported.

JURISDICTION

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding the constitutionality of a New Hampshire statute prohibiting the export of hydroelectric energy generated within the state. The judgment of the New Hampshire Supreme Court was entered on December 23, 1980, upon the docketing of the decision by the clerk. Notices of appeal were filed on January 12, 1981 (J.S. App. 41a; 80-1610 J.S. App. 1a) and on January 15, 1981 (80-1471 J.S. App. 3a). The appeals were docketed on January 19, 1981 (No. 80-1208), February 27, 1981 (No. 80-1471), and March 23, 1981 (No. 80-1610). This Court has jurisdiction of the appeal under 28 U.S.C. 1257(2) because the constitutionality of a state statute is drawn into question and the decision below was in favor of its validity. The Court noted probable jurisdiction on May 18, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 (the Commerce Clause) and Article VI, Clause 2 (the Supremacy Clause) of the United States Constitution are set forth at J.S. 3.

Section 374:35 of the New Hampshire Revised Statutes Annotated (1966 repl.) is set forth at J.S. 2. Sections 4(e), 10(a), 23(b), and 201(a) and (b) of the Federal

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[1] Unless otherwise specified, "J.S. App." refers to the appendix to the Jurisdictional Statement in No. 80-1208.

Power Act (16 U.S.C. 797(e), 803(a), 817(b), and 824 (a) and (b)) are set forth at J.S. App. 42a-46a.

STATEMENT

1. Appellant, New England Power Company (NEPCO),[2] is a public utility which generates electric energy from six hydroelectric projects located on the Connecticut River in New Hampshire and Vermont. Those projects are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act, 16 U.S.C. 792-823. The energy generated from the hydroelectric projects is transmitted and sold by NEPCO at wholesale in Massachusetts, Rhode Island, and New Hampshire in accordance with tariffs and rates approved by the Commission under Part II of the Federal Power Act, 16 U.S.C. (& Supp. III) 824-824k. Because NEPCO is a member of a highly-integrated regional power pool, which is operated as a single unit, the power it generates is transmitted throughout New England (J.S. App. 2a-3a).

On November 21, 1979, the New Hampshire Public Utilities Commission commenced an investigation under N.H. Rev. Stat. Ann. § 374:35 (1966 repl.) to determine whether it should revoke its earlier approval of the exportation of electric power generated from appellant's hydroelectric facilities located in New Hampshire. The state statute under which the State Commission proceeded was first enacted in 1913. It provides as follows:

> *Transmitting Electricity Out of the State Permission Required.* No corporation engaged in the generation of electrical energy by water power shall

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[2] References to "appellant" are to New England Power Company, the appellant in No. 80-1208. Separate appeals have been docketed by the Commonwealth of Massachusetts (No. 80-1471), and by Dennis J. Roberts, II, Attorney General of Rhode Island, and Edward F. Burke, Administrator of Rhode Island Division of Public Utilities and Carriers (No. 80-1610). These appellants were also parties before the New Hampshire Public Utilities Commission and the New Hampshire Supreme Court.

> engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

After several hearings, the New Hampshire Public Utilities Commission withdrew the permission it previously had granted to appellant to transmit hydroelectric energy generated within New Hampshire outside the state (J.S. App. 2a, 40a). Prior to the instant case, the state had never withheld its permission for the exportation of hydroelectric energy (see J.S. 5; J.S. App. 3a-4a, 29a-30a). The State Commission found that the hydroelectric power was required for use within the state in order to keep the electric rates of New Hampshire residents as low as possible (J.S. App. 35a). The State Commission reasoned that "NEPCO's practice of selling to [the Public Service Company of New Hampshire (an intrastate distributor of power)] oil fired capacity while exporting New Hampshire hydro capacity" (*ibid.*) caused New Hampshire residents to pay higher rates than they would if the hydroelectric power was sold within the state.

2. The New Hampshire Supreme Court upheld the State Commission's order (J.S. App. 1a-14a). In so ruling, the court concluded that the Federal Power Act did not preempt the New Hampshire statute upon which the Commission based its order (J.S. App. 4a-8a). The

court stated that the Commission's order did not conflict with the licensing power of the federal government under Part I of the Federal Power Act, 16 U.S.C. 792-823, because the order "does not require compliance with [the state statute] as a condition precedent to securing a federal license under Part I" (J.S. App. 5a). The court observed that "New Hampshire has not sought to stop hydroelectric development of the Connecticut River and does not challenge the licenses granted to NEPCO over the years under Part I of the Federal Power Act" (*ibid.*).

The court further held that in Part II of the Federal Power Act, 16 U.S.C. (& Supp. III) 824-824k, Congress gave "express consent" (J.S. App. 11a) for the regulation imposed by the New Hampshire statute. The court acknowledged that in enacting Part II of the Federal Power Act, Congress chose to fill the gap in the regulation of the interstate sale of electric power created by constitutional limitations on state authority (see, *e.g.*, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927)). It nevertheless ruled that Section 201(b) of the Federal Power Act evidenced Congress' intention to allow the states to regulate in the manner provided by the New Hampshire statute. Pursuant to that provision, the Federal Power Act does not apply to intrastate retail sales of electric energy " 'or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *' " (J.S. App. 6a-7a). In so holding, the court observed that "it might be questionable, in the absence of [Section] 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States * * *" (J.S. App. 10a). But it concluded that Congress could authorize the states to regulate interstate commerce and that Congress had done so in Section 201(b) of the Federal Power Act (J.S. App. 10a-11a).

Although the New Hampshire court sought to reconcile the Public Utilities Commission's order with the Federal Power Act by characterizing the order as "not a control of rates but rather a control of the assignment of the power" (J.S. App. 12a), the court acknowledged that "new rates, contract modifications, or accounting adjustments * * * may naturally flow from the export termination" (J.S. App. 14a). It accordingly remanded the case to the Public Utilities Commission, with the admonition that "[appellant] must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power" (*ibid.*).

SUMMARY OF ARGUMENT

1. The order of the State Public Utilities Commission is contrary to Part II of the Federal Power Act. In that portion of the statute, enacted in 1935, Congress authorized the Federal Energy Regulatory Commission (then the Federal Power Commission) to regulate the transmission and sale of electrical energy at wholesale in interstate commerce. This part of the statute was enacted in response to a series of decisions culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which had "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214 (1964). With the growth of electric utilities which crossed state boundaries, Congress found it necessary to exercise federal authority to fill the regulatory gap created by *Attleboro*. As this Court stated in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953), "Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales."

The New Hampshire order invades the exclusive federal authority established by Part II of the Federal Power Act and therefore violates the Supremacy Clause. By its terms, it withdraws permission for appellant to sell hydroelectric power generated in New Hampshire outside the state (see J.S. App. 2a). Since the energy generated in New Hampshire is dispatched through a regional power pooling system (NEPOOL) (see J.S. App. 3a), it would be impractical to comply with the literal terms of the state commission's order without elaborate alteration of the regional power transmission lines. Hence, the New Hampshire Supreme Court anticipated that compliance would be achieved by "arrangements" that "may naturally flow from the export termination" such as "new rates, contract modifications, or accounting adjustments" (J.S. App. 14a). In this way, all of the economic benefits of the cheaper hydroelectric power would be assigned to New Hampshire consumers.

But it has been settled since at least *Attleboro* that the states have no authority to set rates or to modify contracts with respect to the interstate transmission and wholesaling of electrical energy. The teaching of *Attleboro* is that the states have no constitutional power to regulate interstate transmission and wholesales of electrical energy. Thus, in passing Part II of the Federal Power Act in 1935, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941).

2. Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not support New Hampshire's claim. It states that the provisions of Part II of the Act "shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *."

Both the language and legislative history of Section 201(b) make clear that it is not, as the Supreme Court of New Hampshire mistakenly held, an affirmative grant of authority empowering the states to bar the exportation of hydroelectric energy. By its terms, it simply leaves standing, beyond the preemptive reach of the Federal Power Act, those constitutionally valid state laws that govern hydroelectric facilities. In this respect, it does no more than a host of similar "savings clauses" employed in other federal statutes. Indeed, at the time Congress enacted Section 201(b), this Court had previously held on two separate occasions that the Commerce Clause forbade a state from prohibiting the exportation of a natural resource on the ground that it was needed for its own citizens. See *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). Nothing in the legislative history suggests that Congress intended to depart from or modify the rule of those cases.

Thus, Section 201(b) does not sanction the flat prohibition against exportation of electrical energy ordered by the State Commission here. It merely permits the states to continue to exercise whatever "lawful authority" that might exist under the constitutional holding in *Attleboro*. To conclude otherwise would vitiate the comprehensive federal regulation over the interstate transmission and sale for resale of electrical energy in interstate commerce contemplated by the Federal Power Act, in response to the *Attleboro* decision.

3. The decision below authorizing New Hampshire to regulate the sale outside the state of hydroelectric power generated within New Hampshire is also incompatible with the exclusive federal regulatory jurisdiction established by Part I of the Federal Power Act.

Appellant's six hydroelectric generating projects are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act. These licenses are issued on the condition, *inter alia*, that the project

"* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *" (16 U.S.C. 803(a)). Hence, New Hampshire' proscription of the sale of power outside the state is squarely at odds with the federal policy upon which appellant's projects were licensed, viz., that these hydroelectric projects would benefit interstate commerce. To permit New Hampshire to bar the interstate transmission of such power would vest it with a virtual "veto power over the federal project" and "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal [Energy Regulatory] Commission." *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 164 (1946).

ARGUMENT

THE NEW HAMPSHIRE STATUTE PROHIBITING THE TRANSMISSION OR SALE OF HYDROELECTRIC POWER GENERATED IN THAT STATE TO OTHER STATES IS PREEMPTED BY THE FEDERAL POWER ACT AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. The States Have No Authority to Regulate the Interstate Transmission and Wholesaling of Hydroelectric Energy

1. As this Court has observed, the principal purpose of Part I of the Federal Power Act was to promote the comprehensive development of the nation's water power resources "in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946).[3] Section 23(b) of the Act, 16 U.S.C. 817(b), prohibits construction of non-

[3] Part I of the Federal Power Act was enacted in 1920 as the Federal Water Power Act. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 91 n.2 (1965).

licensed hydroelectric projects on navigable streams, regardless of the effect on commerce, and further requires those proposing a project on a nonnavigable stream to file a declaration of intention and to come before the Federal Energy Regulatory Commission for a determination of whether the " 'interests of interstate or foreign commerce would be affected.' " By employing the standard " 'affect the interests of commerce,' * * * Congress drew upon its full authority under the Commerce Clause." *FPC* v. *Union Electric Co.*, 381 U.S. 90, 96 (1965).

Section 10(a) of the Act, 16 U.S.C. 803(a), requires all licensed projects to be "* * * such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *." The statute thereby undertakes "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation * * *." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 181. As the Court there stated in referring, *inter alia*, to the "comprehensive plan" standard of Section 10a, "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*ibid.*; footnote omitted).

In Part II of the Federal Power Act, enacted in 1935, Congress authorized the Federal Energy Regulatory Commission (then the Federal Power Commission) to regulate the interstate transmission and sale for resale of electrical energy from whatever source. This part of the statute was enacted in response to a series of decisions culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which had "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.' " *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214 (1964). With the growth of electric

utilities which crossed state boundaries, Congress found it necessary to exercise federal authority to fill the regulatory gap created by *Attleboro*. See S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935). As the Court stated in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 307-308 (1953), "Part II was intended to 'fill the gap' * * * left by *Attleboro* in utility regulation." "Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *Id.* at 311.

2. As we shall show, the decision below erroneously construed Section 201(b) of the Federal Power Act as an affirmative grant of authority to the states to bar the transmission of hydroelectric energy into interstate commerce. The language and legislative history of the statute, and the overall scheme of regulation, make it clear that under Section 201(b) only the exercise of a State's pre-existing "lawful authority" is beyond the preemptive reach of Part II. Thus, the "limitations established on [the Federal Energy Regulatory] Commission jurisdiction [in Section 201(b)] were designed to coordinate precisely with those constitutionally imposed on the states," *United States* v. *Public Utilities Commission of California*, *supra*, 345 U.S. at 311; they were not intended to confer new authority upon the states. Hence, where, as here, a state seeks to assert regulatory power over the interstate transmission or sale for resale of hydroelectric power, a prerogative not previously enjoyed, that action is barred by the Supremacy Clause.[4]

Moreover, the decision below is inconsistent with the Congress' policy to promote the regional and national coordination of energy resources. Under Part I of the

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[4] Because the federal Act is premised on the *Attleboro* interpretation of Commerce Clause limitations on state regulatory power, this case presents no occasion to reexamine the correctness of that interpretation.

Act, Congress sought to assure that the nation's water power resources would be developed in a manner which maximizes the benefits to interstate commerce. Under Part II of the Act, Congress intended to encourage the regional coordination of all electrical energy producing resources. The New Hampshire statute at issue here undermines both of these congressional policies.

B. The Language and Legislative History of Part II of the Federal Power Act Confirm that Section 201(b) Does Not Authorize the States to Regulate the Interstate Transmission and Sale for Resale of Electric Power

In upholding the State Public Utility Commission's order withdrawing permission from appellant to transmit hydroelectric power it generated in New Hampshire to other states, the New Hampshire Supreme Court acknowledged that "it might be questionable, in the absence of [Section] 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States * * *" (J.S. App. 10a). But Section 201(b) does not sanction such state parochialism at the expense of other states. To the contrary, the language and legislative history of Part II of the Federal Power Act confirm that Section 201(b) is not an affirmative grant of authority empowering the states to regulate the transmission and sale of hydroelectric energy in interstate commerce.

1. In Section 201(a) of the Federal Power Act (16 U.S.C. 824(a)), Congress "declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal Regulation of matters relating to generation * * * and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the

public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States" (see J.S. App. 45a). Section 201 (b) (1) of the Act (16 U.S.C. (& Supp. III) 824(b) (1)) provides as follows (J.S. App. 4a-8a; emphasis added):

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but except as provided in paragraph (2) shall not* * * * *deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line* * * *.

The language of Section 201(b) makes clear that it is not, as the Supreme Court of New Hampshire mistakenly held, an affirmative grant of authority empowering the states to regulate the interstate transmission and wholesaling of hydroelectric energy in interstate commerce. By its terms, it simply leaves standing, beyond the preemptive reach of the Federal Power Act, those constitutionally valid state laws that govern hydroelectric facilities. The key to a proper understanding of Section 201(b) is the term "lawful authority." The provision merely permits the states to continue to exercise whatever "lawful authority" that might continue to exist under the Commerce Clause after this Court's decision in *Attleboro*. To conclude otherwise would vitiate the comprehensive federal regulation over the interstate transmission and wholesaling of electrical energy in interstate commerce contemplated by the Federal Power Act, in response to the *Attleboro* decision. As we have pointed out (*supra*, pages 11-12), this federal regulation begins at precisely the point at which state regulation was constitutionally limited by that decision. In sum, Section 201(b) was designed to preserve only such "lawful authority" of the states that was not barred by this Court's interpretation of the Commerce Clause in *Attleboro*.

2. The legislative history of Section 201(b) supports our submission that the statute does not constitute an affirmative grant of authority empowering the states to regulate the interstate transmission and sale for resale of hydroelectric energy in the manner sought by New Hampshire in this case. As this Court recognized in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 529 (1945), the bill that became Part II of the Federal Power Act "came before Congress as prepared by the staff of the Commission * * *." In the hearings before the responsible congressional committees, the Commission's representatives testified that the bill was drafted to complement and supplement existing state regulation of utilities without impinging upon the valid authority of the states. See *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 249 (1935); *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess., Pt. 1, 392, 526, 529, 549 (1935). Both the draftsmen and the sponsors of the bill believed that it would not only preserve all constitutionally permissible state regulation of matters primarily of local concern, but would also strengthen the regulatory ability of the states by providing for federal regulation and information gathering that were beyond the capacity of the states. See S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935).[5] As the pertinent House Report concluded (H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935)):

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[5] In this respect, Senator Wheeler, one of the sponsors, stated (79 Cong. Rec. 8775 (1935)):

> It will be recalled that in the bill we provide in title II that nothing in this act shall in any wise interfere with State regulation. We preserved the State regulation completely in the bill, but in title II we made the positive statement that the policy should be not to interfere with State regulation, but to assist and help State regulation.

> The bill takes no authority from State commissions and contains provisions authorizing the Federal Power Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges * * * The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority * * *. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.

The draftsmen of Part II achieved their stated purpose of complementing existing state regulation by designing the statute to limit federal jurisdiction to those areas which this Court had held were beyond the constitutional authority of the states. S. Rep. No. 621, 74th Cong., 1st Sess. 7-8 (1935); *Hearings on H.R. 5423, supra*, Pt. 1 at 523, Pt. 3 at 2143.[6] At the time Congress deliberated over the legislation that because Part II of the Federal Power Act, the decisions of this Court held that neither the generating state nor the state of consumption could regulate the transmission or sale of energy in interstate commerce. *Public Utilities Commission* v. *Attleboro Steam & Electric Co., supra* (generating state may not regulate wholesale rates). *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924) (state of consumption may not regulate wholesale rates). Indeed, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) and *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229

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[6] The primary responsibility for drafting Part II of the Act was discharged by Commissioner Seavey and Mr. DeVane, the Solicitor of the Federal Power Commission. See *Hearings on H.R. 5423, supra*, Pt. 1 at 553; *Hearings on S. 1725, supra*, at 223. Mr. DeVane stated (*Hearings on H.R. 5423, supra*, Pt. 3 at 2143):

> What we did in drawing the bill was to use the language of the Supreme Court in the *Attleboro* and in the *Pennsylvania cases*. We thought that as long as we did that, we were on solid ground and that is what we attempted to do in this bill.

The *Pennsylvania* decision to which DeVane referred is *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920), in which this Court held that the states could regulate retail utility rates.

(1911), the Court had held that a generating state may not restrict or prohibit the flow of energy into interstate commerce.

3. Given the background of the decisions against which Part II of the Federal Power Act became law, we believe that Section 201(b) of that Act cannot be read to justify the flat prohibition or restriction by a state of the exportation of hydroelectric energy generated within its borders. Such prohibitions were held to be unconstitutional prior to the enactment of Part II and there is nothing to indicate Congress' desire to establish a different rule. In striking down as violative of the Commerce Clause an Oklahoma statute designed to accomplish the retention of natural gas within the state in *Oklahoma* v. *Kansas Natural Gas Co.*, *supra*, 221 U.S. at 255, the Court stated—

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

Just as West Virginia and Oklahoma could not bar the exportation of their natural gas on the ground that it was a scarce commodity needed for their own citizens, New Hampshire likewise cannot constitutionally retain the advantage of its hydroelectric energy generated within its borders by prohibiting its exportation to purchasers in other states. "These cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" *Philadelphia* v. *New Jersey*,

437 U.S. 617, 627 (1978) (footnote omitted), quoting from *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928). See also *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). It is therefore clear that the New Hampshire statute, "viewed independently of federal legislation regulating the [interstate transmission and sale of electric power], burden[s] interstate commerce in a manner contrary to the Commerce Clause" *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).[7]

Nothing in the legislative history of the Federal Power Act suggests that Congress intended to grant authority to the states to erect such restrictive trade barriers. Since Section 201(b) sanctions only the exercise of "lawful authority" by the States over the "exportation of hydroelectric energy which is transmitted across a State line," it cannot be construed to support an indisputably unlawful flat prohibition against interstate transmission and sale of such energy.[8] Such a reading would be in-

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[7] *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), cited by the decision below (J.S. App. 11a), is not to the contrary. There, the Court ruled that the Commerce Clause did not forbid South Dakota, in a time of shortage, from confining the sale of the cement it produces solely to its residents. In so holding, however, the Court characterized the State as a "market participant" falling within the scope of the rule of *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), *i.e.*, that the state was acting as a private business functioning in the marketplace. Here, on the other hand, New Hampshire is attempting to control the wholesale rates paid for hydroelectric power generated by a private business. It therefore cannot be gainsaid that it is acting in a governmental regulatory capacity in favor of its own citizens and thereby erecting barriers to trade prohibited by the Commerce Clause.

[8] The statement during the House floor debates of Congressman Rogers of New Hampshire, upon which the decision below relied (see J.S. App. 7a), speaks of "certain rights" of the States over the exportation of hydroelectric energy which is transmitted across state lines. Section 201(b) did not appear in the original Senate bill, but was inserted in the House as Congressman Rogers of New Hampshire explained, in order to insure that certain states

consistent with the comprehensive federal regulation over such sales established by Part II of the Federal Power Act. Thus, by stipulating that Part II of the Federal Power Act "shall not * * * deprive a State * * * of its lawful authority now exercised over the exportation of hydroelectric energy * * *," Congress did no more than to provide a savings clause common in federal statutes that complement existing state regulation.[9]

In sum, nothing in the language of Section 201(b) or its legislative history supports the conclusion that Congress intended to grant new authority to the states by approving the flat state prohibitions against exportation of natural resources previously struck down by this Court in *Pennsylvania* v. *West Virginia*, *supra*, and

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were not deprived of rights they then exercised over the exportation of hydroelectric energy transmitted across state lines. Congressman Rogers stated as follows (79 Cong. Rec. 10527 (1935)):

> Just one word further. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire on the public service commission of our State, we, for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses; but the Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

At that time, however, New Hampshire had not imposed the impediment to interstate commerce at issue here and could not lawfully have done so. See, *supra*, pages 17-18.

[9] See, *e.g.*, 16 U.S.C. 821, and *First Iowa-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 175-176.

Oklahoma v. *Kansas Natural Gas Co., supra.*[10] Section 201 (b) therefore does not justify the economic Balkanization that otherwise would exist if the states were permitted to impede the free flow of electricity. Indeed, one would expect that if Congress intended such a radical departure from the Court's decisions under the Commerce Clause, it would have explicitly manifested such a purpose. The indications, however, are precisely to the contrary. While the House Report discusses Section 201(b), as added by the House bill, it does not state that the change from the Senate version of the bill was intended to be a substantive change. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 27 (1935). There is accordingly no reason to conclude that "Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints." *Lewis* v. *BT Investment Managers, Inc., supra,* 447 U.S. at 35.

4. Even on the assumption that "the provision [in Section 201(b)] was intended to preserve the validity of certain state statutes prohibiting or regulating the *volume* of state power exported (emphasis supplied)" (*United States* v. *Public Utilities Commission of California, supra,* 345 U.S. at 300-301 n.4),[11] the order of the New Hampshire Public Utilities Commission has other consequences that plainly contravent Part II of the Fed-

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[10] Indeed, when Congress intended to grant authority to the states under the Federal Power Act or to provide joint federal and state authority, it did so in clear and unmistakable terms. For example, Section 201(a) of the Act permits the states to regulate generation of electrical energy and retail rates. Moreover, Section 302, 16 U.S.C. 825a, establishes a dual system of federal and state regulation of accounting for depreciation.

[11] The quoted statement from this Court's opinion in *United States* v. *Public Utilities Commission of California, supra,* is dictum; that case did not involve a claim in support of a statute under Section 201(b). Nor did *Safe Harbor Water Power Corp.,* 5 F.P.C. 221, 235 (1946), which the Court there cited (*ibid.*), present a question of the validity of a state prohibition against the exportation of hydroelectric energy.

eral Power Act. To be sure, the literal terms of the state commission order withdraws permission for appellant to sell hydroelectric power generated in New Hampshire outside the state (see J.S. App. 2a). However, as a practical matter, the order has a different effect. Since the hydroelectric energy generated in New Hampshire is dispatched through a regional power pooling grid system (NEPOOL), the decision below recognized that it would be technically impossible for appellant to end out-of-state transmission of hydroelectric power without elaborate alteration of the regional power transmission lines. Hence, the New Hampshire Supreme Court anticipated that compliance would be achieved by "arrangements" that may naturally flow from the export termination such as "new rates, contract modifications, or accounting adjustments" (J.S. App. 14a). For example, the New Hampshire Supreme Court construed the Public Utilities Commission's order as requiring that all of the economic benefits of the hydroelectric power—which is cheaper than electricity produced from oil-fired generators—must be assigned to New Hampshire consumers, rather than requiring that appellant terminate the transmission of power through the regional power pool (J.S. App. 11a-12a). Simply put, the net effect of the New Hampshire Commission's order is to permit the state to regulate the wholesale price of that portion of the hydroelectric energy sold within New Hampshire.

It is, however, settled at least since *Attleboro* that the states have no authority to set rates or to modify contracts with respect to the interstate transmission and wholesaling of electrical energy in the manner contemplated by the decision below. Part II of the Federal Power Act filled the regulatory gap, and, after declaring that "Federal regulation of [such] matters * * * is necessary in the public interest" (16 U.S.C. 824(a)), granted to the Federal Energy Regulatory Commission "jurisdiction over all facilities for such transmission or sale of electric energy" (16 U.S.C. (& Supp. III) 824

(b)(1)). Thus, in passing Part II of the Federal Power Act in 1935, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941). The decision below is therefore incompatible with the teaching of *Attleboro* that the states have no constitutional power to regulate interstate transmission and wholesales of electrical energy.

In sum, Section 201(b) does not authorize such state control as would impose the "new rates, contract modifications, or accounting adjustments, [that] may naturally flow from the export termination" (J.S. App. 14a) ordered by the New Hampshire Commission. Since Congress conferred such ratemaking authority on the Federal Energy Regulatory Commission, it could not have intended to allow state regulation in this sphere as well. Indeed, New Hampshire's attempt, through modification of contract rights and rate structures, to gain all of the economic benefits of its hydroelectric power at the expense of its regional neighbors, is contrary to the requirement of Section 205(b) of the Federal Power Act, 16 U.S.C. 824d(b), that the charges and terms of service offered by federally-regulated utilities be free of any "unreasonable difference" "as between localities." Since the New Hampshire order admittedly seeks to achieve lower wholesale rates for New Hampshire companies than those paid by public utilities in the neighboring states, it (no less than a similar ratemaking effort by a neighboring state) must give way under the Supremacy Clause. Section 201(b) does not sanction such state parochialism at the expense of other states. As the Court recently observed in an analogous context in *Maryland* v. *Louisiana*, No. 83 Orig. (May 26, 1981), slip op. 24-25, "[t]he

FERC need not adjust its rulings to accommodate the [state] statute. To the contrary, the State may not trespass on the authority of the federal agency."

5. Finally, the decision below is contrary to Part II of the Federal Power Act insofar as the federal regulation established by Congress was intended to achieve the regional coordination of power resources which the states were unable to accomplish.[12] As one of the draftsman of Part II stated:

> Title II of this bill provides for regional development, the most economic development in this industry, under the supervision of the Federal Power Commission. It proceeds upon the engineering truth that the most effective utilization of our power resources requires positive Federal action designed to develop these resources on a regional rather than on a State basis.

Hearings on H.R. 5423, supra, Pt. 3 at 2168 (remarks of Mr. DeVane, Solicitor of the FPC).

Congress' purpose to coordinate such regional development of energy resources is further evidenced in Section 202 of the Act, 16 U.S.C. 824a. In order to assure "an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources" (16 U.S.C. 824a(a)), Section 202 authorizes and directs the Commission to divide the nation into regional districts in which the facilities for the generation, transmission and sale of electric energy could be coordinated. Congress wanted the Commission to encourage and promote the interconnection and coordination of all electric energy systems throughout the nation. Most recently, Congress has reaffirmed its desire to maximize the regional and national coordination of

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[12] S. Rep. No. 621, 74th Cong., 1st Sess. 17-18 (1935); *Hearings on H.R. 5423, supra*, Pt. 1 at 549, Pt. 3 at 2168.

energy resources by the enactment of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, which added Sections 210, 211, and 212 to Part II of the Federal Power Act, 16 U.S.C. (Supp. III) 824i, 824j, and 824k.[13] Those provisions establish additional mechanisms for increasing the regional and national sharing of energy facilities and resources.

The goal of regional coordination of energy resources has been largely realized in the New England region, where the electric utilities participate in the most highly integrated, and successful, power pool in the country. The New Hampshire statute and state commission order, however, undermine the regional sharing of resources by allocating all of the economic benefits of New Hampshire-generated hydroelectric power to the citizens of that state. As such, they "stand[] as * * * obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The New Hampshire statute and state commission's order therefore violate the Supremacy Clause.

C. The Order of the New Hampshire Public Utilities Commission Is Contrary to Part I of the Federal Power Act

The decision below construing Section 201(b) of the Federal Power Act as authorizing New Hampshire to regulate the transmission outside the state of hydroelectric power generated within New Hampshire is also incompatible with the exclusive federal regulatory jurisdiction established by Part I of the Federal Power Act.

Appellant's six hydroelectric generating projects are licensed by the Federal Energy Regulatory Commission

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[13] The constitutionality of that act is currently pending before the Court in *FERC and James B. Edwards* v. *Mississippi*, No. 80-1749.

under Part I of the Federal Power Act. These licenses are issued on the condition, *inter alia*, that the project "* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *" (16 U.S.C. 803(a)). Hence, New Hampshire's proscription of the sale of power outside the state is squarely at odds with the federal policy upon which appellant's projects were licensed, viz., that these hydroelectric stations would benefit interstate commerce. To permit New Hampshire to bar the interstate transmission of such power would vest it with a virtual "veto power over the federal project" and "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal [Energy Regulatory] Commission." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 164.

Contrary to the New Hampshire Supreme Court's suggestion (J.S. App. 5a), the fact that the state commission's order does not require compliance with N.H. Rev. Stat. Ann. § 374:35 (1966 repl.) as a condition precedent to obtaining a federal license under Part I does not save the order. The Court viewed Part I of the Federal Power Act much too narrowly. The Act does not simply authorize the federal authorities to grant licenses; it bespeaks a policy of benefitting interstate commerce and rests the licensing authority on that policy. Because the state commission's order thwarts that policy by attempting to retain all the benefits of the projects within New Hampshire, it cannot stand. As the Court stated in the analogous context of natural gas regulation, "although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation

ordained by Congress." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 92 (1963).[14]

CONCLUSION

The judgment of the Supreme Court of New Hampshire should be reversed.

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[14] Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not undermine our submission that Part I of the Federal Power Act preempts the state commission's order. By its terms, Section 201(b) applies only to Part II of the Federal Power Act. But even if the "lawful authority" of the states over the exportation of hydroelectric energy preserved by Section 201(b) has any application to Part I of the Act, it is plain that the provision simply permits the states to license those projects on nonnavigable streams that do not "affect" interstate commerce. Section 201(b) does not authorize state authority of the type involved in this case over projects that are indisputably located on a navigable waterway such as the Connecticut River. See *Bellows Falls Hydro-Electric Corp.*, 2 F.P.C. 380 (1941).

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